

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000248-001 DT

08/21/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

CRAIG J HOEBING (001)

MARK N WEINGART

REMAND DESK-LCA-CCC

SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M-0751-TR-2013-026138.

Defendant-Appellant Craig J. Hoebing (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence. Defendant contends the trial court erred in allowing the State to present evidence of Defendant's BAC based on retrograde extrapolation. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On September 25, 2013, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); improper right turn, A.R.S. § 28-751(1); and driving without lights at night, A.R.S. § 28-922. At the trial in this matter, Sergeant Kenneth Moore testified he stopped Defendant at 7:42 p.m. on September 25, 2013. (R.T. of Jun. 18, 2014, at 14, 17, 19, 23-24, 91-92.) Officer Juan Berumen subsequently conducted a DUI investigation and placed Defendant under arrest. (*Id.* at 26-27, 37, 141, 143, 146-52.) Crime Scene Specialist Kristen Oleksik and Officer Berumen both testified Ms. Oleksik drew Defendant's blood sample at 10:00 p.m. (*Id.* at 116-17, 123, 126, 130-31, 159, 164.)

Vincent Villena testified he was a forensic scientist for the Scottsdale Crime Laboratory and on October 1, 2013, tested the sample of Defendant's blood. (R.T. of Jul. 9, 2014, at 246, 249-50.) The results of that testing showed a BAC of 0.144. (*Id.* at 265.) When asked how many standard drinks it would take for a male 6' 4" and 220 pounds to have that BAC, Defendant's attorney objected on the grounds that the weight was a matter of speculation. (*Id.* at 267.) Because this was just a hypothetical question, the trial court overruled that objection. (*Id.*) Defendant's attorney then objected on the grounds of relevance, and the trial court overruled that objection. (*Id.*) Mr. Villena said it would take 8.74 standard drinks. (*Id.* at 268.)

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Mr. Villena discussed how alcohol is absorbed into and eliminated from the body and that the average person would eliminate alcohol at a rate of 0.015 per hour. (R.T. of Jul. 9, 2014, at 273–76.) Mr. Villena then discussed the concept of retrograde extrapolation. (*Id.* at 277.) He acknowledged Defendant’s blood sample was drawn 2 hours and 18 minutes after he had been driving. (*Id.* at 277–78.) Mr. Villena testified that, doing a retrograde extrapolation back 20 minutes would give a BAC of “approximately .149, with a possible range of .147 to .150.” (*Id.* at 278.) Mr. Villena then discussed the assumptions he made and the variations in the absorption and elimination rates that different persons have. (*Id.* at 278–80.) The following exchange then occurred with Defendant’s attorney objecting as follows:

THE PROSECUTOR: Okay. So what you’re saying is the 18 to 20 minutes past the 2 hours is really not—didn’t really affect much in this case.

A. It is a small window—

DEFENDANT’S ATTORNEY: Objection; relevance to this case.

THE COURT: Overruled.

THE WITNESS: Comparing the calculation, the calculated [*sic*] only added about .005. It’s a small elimination.

THE PROSECUTOR: Your Honor, at this time, I’m going to move Exhibits 3, 4, 5.

THE COURT: Any objection to 3, 4, and 5?

DEFENDANT’S ATTORNEY: The objection is, it’s not relevant to this case.

THE COURT: Is that objection specific to one exhibit?

DEFENDANT’S ATTORNEY: To the actual results.

THE COURT: Okay. I just wanted the record to be clear on which exhibit he’s objecting to.

THE PROSECUTOR: Here’s all three of them.

THE COURT: Okay. So, Counsel, your objection is to Exhibit 5, the lab [Examination Report]?

DEFENDANT’S ATTORNEY: Yes, ma’am.

THE COURT: Okay. Okay. All right. Over objection, State’s 5, 4, and 3 will be admitted.

(R.T. of Jul. 9, 2014, at 280.)

After cross-examination and re-direct examination of Mr. Villena, the State rested. (R.T. of Jul. 9, 2014, at 304.) Defendant’s attorney then made a motion for judgment of acquittal contending the witness could not do a retrograde extrapolation without knowing the person’s weight and gender, and at what time the blood was drawn. (*Id.* at 306.) Defendant’s attorney noted the questioning concerned a hypothetical weight of 220 pounds, but there was no testimony of what Defendant’s actual weight was. (*Id.* at 307.) Defendant’s attorney stated, “So the retrograde’s deficient, and the .08 charge should not go forward to the jury.” (*Id.*) The trial court noted the reference to weight was used to calculate the number of drinks in the body and not for the retrograde. (*Id.* at 310.) Defen-

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dant's attorney then amended his motion by contending the State had not shown Defendant's weight. (*Id.*) After some discussion, Defendant's attorney clarified that the basis of his motion was the State had not presented evidence of Defendant's BAC within the 2-hour window. (*Id.* at 312–13.) The trial court ruled there was enough evidence to submit the charge to the jurors. (*Id.* at 314.)

After Defendant's attorney called Officer Berumen to testify, Defendant rested and the State had no rebuttal. (R.T. of Jul. 9, 2014, at 324.) After deliberation, the jurors found Defendant guilty of both charges. (*Id.* at 326–27.) The trial court later imposed sentence. (R.T. of Aug. 19, 2014, at 332–34.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO PRESENT EVIDENCE OF DEFENDANT'S BAC BASED ON RETROGRADE EXTRAPO-
LATION.

Defendant contends the trial court abused its discretion in allowing the State to present evidence of Defendant's BAC based on retrograde extrapolation. At trial, when Mr. Villena testified about retrograde extrapolation and that Defendant's BAC would have been "approximately .149, with a possible range of .147 to .150," Defendant's attorney did not object. (R.T. of Jul. 9, 2014, at 278.) The applicable rule of evidence provides that, to preserve a claim of error on appeal, a party must make a timely objection or motion to strike and state the specific ground for the objection. Rule 103(a)(1)(A) & (B), ARIZ. R. EVID. Because Defendant's attorney did not object at trial, he has waived this issue on appeal.

When the State offered the test results as an exhibit (Exhibit 5), Defendant's attorney objected on the grounds that the test results were not relevant. (R.T. of Jul. 9, 2014, at 280.) The applicable rule of evidence provides as follows:

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Rule 401, ARIZ. R. EVID. The fact "of consequence" was Defendant's BAC and whether Defendant's BAC was 0.08 or more within 2 hours of driving. The test results that showed Defendant's BAC was 0.144 had the "tendency to make [that] fact more or less probable than it would be without the evidence," thus the test results were relevant. The trial court therefore correctly overruled Defendant's relevance objection.

After the State rested, Defendant's attorney made a motion for judgment of acquittal contending the State had not presented sufficient evidence of Defendant's BAC. As noted above, the trial court admitted Mr. Villena's testimony that Defendant's BAC within 2 hours of driving was approximately 0.149 with a range of 0.147 to 0.150, and admitted the test results showing Defendant's BAC was 0.144. This evidence was sufficient for the jurors to find that Defendant's BAC was 0.080 or greater, thus the trial court correctly denied Defendant's motion for judgment of acquittal.

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As part of Defendant's motion for judgment of acquittal, Defendant's attorney contended the retrograde extrapolation was not accurate because the State did not have Defendant's weight. As noted above, to preserve a claim of error on appeal, Rule 103(a) requires a party to make a timely objection or motion to strike and state the specific ground for the objection. When the State offered Mr. Villena's testimony, Defendant's attorney did not object, and neither at that point nor when arguing the motion for judgment of acquittal did Defendant's attorney make a motion to strike that testimony. Defendant has thus waived this claim of error.

On appeal, Defendant contends the retrograde extrapolation evidence was not admissible because there was "no evidence that the State's criminalist gave Appellant the 'benefit of the doubt' with 'conservative estimates that erred in favor of Appellant,' " citing *State ex rel. Montgomery v. Miller (Madrid)*, 234 Ariz. 289, 321 P.3d 454 (Ct. App. 2014). For two reasons, this Court concludes this argument does not entitle Defendant to relief on appeal.

First, in *Miller (Madrid)*, the only place in that opinion where the court referred to the "benefit of the doubt" was where it noted the trial court determined the criminalist's testimony was unreliable in part because he did not give "the defendant the benefit of the doubt" for the unknown variables. *Miller (Madrid)* at ¶ 57. That opinion never held that a criminalist must give a defendant "the benefit of the doubt" for evidence of a retrograde extrapolation to be admissible.

Second, to the extent *Miller (Madrid)* uses the phrases "the benefit of the doubt" and "conservative estimates that erred in favor of Appellant" (*Miller (Madrid)* at ¶ 58), Defendant's attorney never made an objection that the criminalist's testimony did not satisfy Rule 702 or that the criminalist did not give Defendant the benefit of the doubt with conservative estimates that erred in favor of Defendant. Because Defendant's attorney did not make that objection at trial, Defendant has waived that objection on appeal. Moreover, it appears from Mr. Villena's testimony that he did rely on conservative estimates that erred in favor of Defendant. (R.T. of Jul. 9, 2014, at 278–80.)

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not abuse its discretion in allowing the State to present evidence of Defendant's BAC based on retrograde extrapolation.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClellenn

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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